



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 05, 2022

IN THE MATTER OF:

Appeal Board No. 621911

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective April 16, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by MANHATTAN & BRONX SURFACE prior to April 16, 2021 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which testimony was taken. There were appearances by and on behalf of the claimant and the employer. By decision filed February 25, 2022 (A.L.J. Case No.), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.

Our review of the record reveals that the case should be remanded to hold a hearing. The record has not been sufficiently developed on whether the claimant had a compelling reason for the conduct which resulted in her separation. At the initial hearing, the claimant contended that she was within her right to refuse the drug test on May 17 because she was ordered to submit to a blood test in contravention of her union agreement and that the portion of the employer's drug policy entered into evidence at the hearing was incomplete as it did not include a provision which specified the types of tests for which refusal will result in dismissal. Although the Board is bound by the arbitrator's findings of fact with respect to the claimant's conduct in refusing to submit to a drug test in violation of the employer's policy which resulted in her dismissal, pursuant to Matter of Guimaraes (69 NY2d 989

[1986]), the Board may make additional findings of fact to form a conclusion as to whether the conduct constitutes misconduct for Unemployment Insurance purposes. The arbitration decision makes no findings of fact regarding what type of drug test the claimant was ordered to take on May 17, the relevant specifics of the employer's drug testing policy, or why the claimant refused the test in order to determine whether the claimant had a compelling reason for such refusal.

At the remand hearing, the employer is directed to produce the complete Drugs and Controlled Substances policy, including paragraph 5.3 referred to in paragraph 6.2 of Appendix E-1 of such policy. The complete policy shall be entered into evidence after appropriate confrontation. The employer is further directed to produce the claimant's supervisor, Station Supervisor Dawn Hicks, who ordered the claimant to take the drug test on May 17. The Administrative Law Judge shall question Ms. Hicks regarding the type of test the claimant was ordered to take, why such test was ordered, and under what provision of the employer's policy such test was ordered. The Administrative Law Judge may take any further testimony and evidence necessary to decide the case.

Now, based on all of the foregoing, it is

ORDERED, that the decision of the Administrative Law Judge be, and the same hereby is, rescinded; and it is further

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issue of misconduct, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and, so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the issue of misconduct, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

MARILYN P. O'MARA, MEMBER